United States Court of Appeals

for the Second Circuit

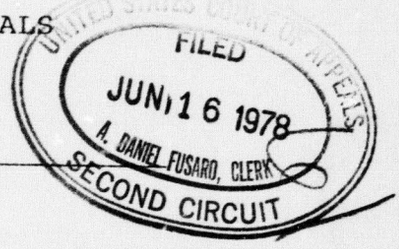
PETITION FOR REHEARING EN BANC

#76-7637

Original

No. 76-7637

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



CHARLES D. REICH,

Plaintiff-Appellant,

-against-

DOW BADISCHE COMPANY and DOW CHEMICAL COMPANY,

Defendants-Appellees.

B P/5

PETITION ON BEHALF OF
PLAINTIFF-APPELLANT FOR A REHEARING
AND SUGGESTION FOR REHEARING EN BANC

COLES WEINER TESSER, P.C.
1775 Broadway
New York, New York 10019
(212) 586-5212
Attorneys for Plaintiff-Appellant

HAROLD M. WEINER,
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES D. REICH,

PLAINTIFF-APPELLANT,

-against--

DOW BADISCHE COMPANY and DOW CHEMICAL COMPANY,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION ON BEHALF OF PLAINTIFF-APPELLANT
FOR A REHEARING AND SUGGESTION FOR REHEARING EN BANC

The attorneys for Petitioner, the Plaintiff-Appellant Charles D. Reich, submit this Petition for a rehearing and suggestion for rehearing en banc, in the light of events transpiring and matters brought to their attention which had not been considered or not considered adequately by the 2-1 panel rendering the decision in this matter.

This appeal involves the still unsettled question of whether or not oral notice to the Secretary of Labor satisfies

the federal law requirement of notife to the Secretary of Labor , pursuant to 29 U.S.C. Sec. 626, that a person claiming to be aggrieved under the Age Discrimination in Employment Act intends to sue on his own behalf; and whether the conduct of this Plaintiff-Appellant was diligent enough to invoke equitable relief of a tolling of the statute of limitations imposed by the ADEA section. Argument follows.

POINT I

THE ORAL NOTICE OF THE PLAINTIFF-APPELLANT WAS SUFFICIENT TO SATISFY THE REQUIREMENT OF THE ADEA THAT NOTICE BE GIVEN OF INTENT TO SUE

The only case discussing the point of oral notice as a satisfaction of the statutory requirement of 29 U.S.C. Sec. 626 (d) is Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Georgia 1973). In Woodford, a telephone call was held to suffice, provided that the notification to the Dept. of Labor took place within 180 days:

> "...where and employee, within one hundred and eighty days of his discharge reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination

Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action."

In the Brief of Defendants-Appellees, p. 13, in this Court, they cite criticism and rejection of the Woodford doctrine by two other district courts, but what they fail to discuss is the similarity between the misleading of the plaintiff in Woodford, which they cite, and the total misleading of the plaintiff-appellant here, in the letter of April 24, 1974, which the defendants-appellees set forth emphasizing the italicized portion,

> "the fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit"...(brief of defendant-appellees, p. 13.

They go on to quote, however,

> "We do not, of course, encourage or discourage such suits."

In view of the myriad contacts of the plaintiff-appellant with the U.S. Department of Labor there could hardly be a greater incident of misleading him, as by April 24, 1974 he had at least six contacts by mail, and had orally notified them twice, according to his own affidavit, which must, on a motion for Summary Judgment, be deemed proven and true. Set forth as Appendix "A" is a letter written in connection with the law firm's predecessor partnership's investigation in the course of the preparation of opposing papers to

summary judgment, which will later be further referred to herein.

The view of the local officials of the U.S. Department of Labor does not comport with the Department's own legal counsel, and in a proposed brief amicus curiae, the U.S. Department of Labor, by its Solicitor, supports the view of the Plaintiff-Appellant in this matter, and the decision in Woodford, supra. (Brief for the United States of America as Amicus Curiae, Shell Oil Co. v. Dartt, 98 S.Ct. 600 (1977) cited at p. 6681, slip opinion, instant case.) Unfortunately, the leave to file the brief amicus curiae was denied the Department of Labor, leaving the views of laymen such as the writer of the letter of April 2, 1974 above, the arbiters for the moment of the Wage and Hours Division policies. That is hardly dispositive of the legal issue.

In his dissenting opinion in the panel decision in this case, Chief Judge Feinberg points out that the conduct of the Plaintiff-Appellant here is easily distinguishable from the equivocal conduct of the plaintiff in Hays v. Republic Steel Corp., 531 F. 2d. 1307, 1312 (5th Cir. 1976).

Precisely the exact same language of the letter given to Reich appears to be the boilerplate form utilized across the country by the Wage and Hours Division, and criticized

in the proposed brief amicus curiae in Dartt, supra, at page 35 thereof, set forth herewith:

> While the court of appeals properly held that the 180-day time limit in Section 7(d) of the Act was subject to tolling and was in fact tolled, its decision is equally sustainable on the grounds that respondent's original communication was sufficient to satisfy the Section 7(d) requirement. (30)

(30) Out of an abundance of caution Mr. Speer, the Assistant Area Director of the Department's Wage and Hour Division, notified Ms. Dart that "(t)he fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit" (app. 69). The same precautionary effort to adhere strictly to a literal reading of the Act's procedural requirements caused Speer to reinitiate conciliation upon receipt of the formal notice of intent to sue, even though the Labor Department had already satisfied its responsibility to conciliate under the identical statutory mandate of Section 7(b). It is our contention, however, that Ms. Dartt's action in lodging a complaint with the Secretary of Labor satisfied the requirements of Section 7(d). (emphasis supplied).

It is important to note that once a complaint is lodged with the Department of Labor, not only is the employer apprised of what it would have to defend if failure of the mandated conciliation and mediation procedures leads to private litigation by the complaining party, but that it can be faced with a suit by the Department of Labor in futuro,

whether or not the individual complainant ever sues on his or her own behalf under the ADEA. And, the ADEA enforcement suit can be brought, at any time, within the statutory period 29 U.S.C. 626 (e). It thus has a duty to preserve records, and cannot be prejudiced by informality, as opposed to a formal notice in writing of the intent to sue privately. The notice provision of Section 7(d) has as its purpose, not the notification of the employer that a private lawsuit is pending, but that the Secretary be given an opportunity to avoid litigation. The legislative history bears this contention out clearly. S. Rep. No. 723, 90th Congress, 1st Sess. p. 5 (1967); H.R. Rep. No. 805, 90th Cong., 1st Session p. 5 (1967). Since the statutory framework requires the Secretary to "notify promptly all persons named therein which was done in the instant case, as in every case. Thus, no prejudice inured to the defendants-appellees.

POINT II

PLAINTIFF-APPELLANT DID NOT "FAIL TO COMPLY" WITH THE REQUIREMENTS OF SECTION 633(b) OF THE ACT, AND IT IS NOT A BAR TO THE MAINTENANCE OF THIS ACTION IN ANY EVENT

The majority opinion of the panel held that the Plaintiff-Appellant, Reich, failed to comply with Section 633(b) of Title 29, in that he did not timely first file a suit with the N.Y.S. Division of Human Rights.

Reich's filing of a written complaint to the State Division was preceded by oral contacts with the State Division within a short period of a few weeks after his discharge. (See discussion of his affidavit at p. 6669-6670 of slip opinion, opinion of Judge Danaher, concurring.) He has further, since the decision, now located the person alleged to be an "unidentified person" who told him at the outset that his case was one for federal relief and he should go to the Wage and Hours Division of the Department of Labor to begin with." That person, Ms. Lillian Fennel, was at the time the field investigator in Region 1b of the State Division of Human Rights, and currently is the Regional Director in Brooklyn. She has indicated that his contention is factually correct, and that the policy of the State Division of Human Rights at that time had been to give such advice to complainants of Age discrimination, despite the jurisdiction granted the Division by its state statute, N.Y.Executive Law Section 297.

This is born out by the similar conduct of the Division in a case involving Schlitz Brewing Company, Smith v. Joseph Schlitz Brewing Co., No. 77-1745, U.S. Ct. of Appeals, 3rd Circuit. That case is still pending, and the U.S. Department of Labor has filed a brief in it, again urging the position of the dissenting opinion in Goger v. H.K. Porter (Garth, J.), as the correct one under the law, and as Goger v. H.K. Porter

429 F. 2d 13 (3rd Cir. 1974) appears to be heavily relied upon by the majority of the panel in the instant case, it becomes quite critical to examine its rationale, which is currently up for review in Holliday vs. Ketchum, McLeod & Grove, Inc., No. 77-1867, (3rd Cir.) and which has recently been granted an en banc rehearing by that Court. (Argument held; decision pending.).

The Goger decision clearly flies in the face of at least two United States Supreme Court decisions, Love v. Pullman Co. 404 U.S. 522, in which the Court declined to require laymen unassisted by counsel to commence the state proceedings required by a literal reading of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(b), and Burnett v. New York Central Railroad Company., 380 U.S. 424. It is particularly inappropriate to advance the technical arguments made by the majority of the panel in the instant case, in the light of the recent U.S. Supreme Court holding in Lorillard v. Pons., 46 U.S. Law Week 4150 (Feb. 21, 1978). No. 76-1346, 16 FEP cases 885, that "Although not required by the FLSA, prior to the initiation of any ADEA action, an individual must give notice to the Secretary of Labor of his intent to sue, in order that the Secretary can attempt to eliminate the alleged unlawful practice through informal methods." (emphasis supplied, 16 FEP at p. 886), and that "Congress specifically provided for both "legal or equitable relief" under the ADEA as opposed

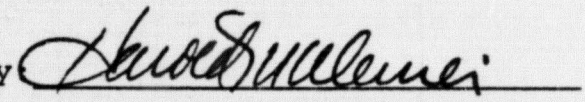
to Title VII of the Civil Rights Act. (FEP cases at p. 888). Moreover, the holding of the two judge majority of the panel is dictum, since the Court below did not reach that issue, deciding solely on the basis of Section 626 of Title 29; it is discussed here to show that the Plaintiff-Appellant would not be barred by that section if the Court should grant, in light of the cases cited herein, a reversal and trial on the merits of the case, either by way of a granting of the rehearing and a change of its opinion in the light of the foregoing, or a reversal of the result of the panel by a rehearing en banc.

CONCLUSION

Because of the foregoing, the dissenting opinion of Chief Judge Feinberg is the correct view of the law and summary judgment should not have been granted the defendants-appellees. This case should be reversed and remanded for a trial on the merits, with costs to the Plaintiff- Appellant.

Respectfully submitted,

COLES WEINER TESSER, P.C.

By 

Harold M. Weiner
Attorney for Plaintiff-Appellant
1775 Broadway
New York, New York 10019
(212) 586-5212

New York, New York
June 15, 1978

APPENDIX

Horsepound Road, RFD #8
Carmel, N.Y. 10512

August 22, 1976

Mr. Robert G. Hayhurst
Coles & Weiner
1775 Broadway
New York, N.Y.

Dear Mr. Hayhurst:

My contacts with the U.S. Department of Labor were as follows:

My letters to them -

ESA - Wages & Hours Division, 1515 Broadway, NYC December 4, 1973
Charles J. Gau, 970 Broad Street, Newark, N.J. January 12, 1974
" " " " " " " January 24, 1974
" " " " " " " March 30, 1974
" " " " " " " April 9, 1974
" " " " " " " April 21, 1974
Leo Friedman, Wage & Hour Div, 1515 Broadway, NYC August 4, 1974
Francis V. LaRuffa " " " " " December 26, 1975
" " " " " " " February 11, 1976
Frank R Mancuso " " " " " March 2, 1976

Letters to me from The U.S. Department of Labor:

Norman Bromberg, 26 Federal Plaza, NYC December 11, 1973

Charles J. Gau, Wage & Hour Division, Newark, N.J. January 7, 1974
Bernard A. Clark " " " " " August 13, 1974
Leo Friedman 1515 Broadway NYC Janaury 23, 1975
Francis V. LaRuffa " " " February 11, 1976 + Feb 18, 1976
Leo Friedman " " " February 27, 1976
" " " " " April 6, 1976
" " " " " May 19. 1976

I cannot document all the telephone calls I made. There were a number since 1973. I also talked by telephone to the N.Y. State Human Rights Commission, Division of Human Rights, 79 Worth Street, NYC in August and December 1973 and in May 1974

I had three meetings. First was with Norman Bromberg in 1973, probably in November. Second, with Friedman, Gau and Clark at 1515 Broadway, NYC, December 5, 1974. Third, LaRuffa, 1515 Broadway, December 19, 1975.

Please note paragraphs 3&4 of defendants' interrogatories. Does this include my contacts with Senator Javits?

Yours very truly,

Charles D. Reich

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK

SANDRA GOODMAN, being sworn, says:

I am not a party to this action; I am over 18 years of age; I reside at 46 West 94th Street, New York, New York.

On June 15, 1978 I served the within Petition upon The Clerk of the Second Circuit Court of Appeals, Mr. Paul Brenner, Esq., U.S. Department of Labor, and Kaye, Scholer, Fierman, Hays & Handler, Esqs., attorneys for Defendants-Appellees, in this action at the following addresses: Federal Courthouse, U.S. Department of Labor, Washington, D.C., and 425 Park Avenue, New York, New York the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

x Sandra Goodman
SANDRA GOODMAN

Sworn to before
me this 15th day
of June, 1978

Kristine M. Lardner
Notary Public

KRISTINE M. LARDNER
Notary Public, State of New York
No. 31-4635594
Qualified in New York County
Commission Expires March 30, 1980